COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2014-SC-095

ASBURY COLLEGE, NOW
ASBURY UNIVERSITY **APPELLANT**

V.

DEBORAH A. POWELL,
DEBRA ANN DOSS & BRYAN BEGLEY DALEY **APPELLEES**

KENTUCKY COURT OF APPEALS
No. 2012-CA-000653-MR

JESSAMINE CIRCUIT COURT
CASE NO. 09-CI-00140
* * * * * * * * * * *

BRIEF FOR APPELLEE, DEBORAH A. POWELL

* * * * * * * * * *

DEBRA ANN DOSS
108 PASADENA DRIVE, SUITE 200
LEXINGTON, KENTUCKY 40503
(859)260-1980
(859)260-1310 (FAX)

BRYAN BEGLEY DALEY
2692 RICHMOND ROAD, SUITE 204
LEXINGTON, KENTUCKY, 40509
(859) 233-7400

ATTORNEYS FOR APPELLEE,
DEBORAH A. POWELL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that TEN (10) copies of this Brief were hand delivered to Hon. Susan Stokley Clary, Clerk, Kentucky Supreme Court, 209 Capitol Building,700 Capitol Avenue, Frankfort, Kentucky, and to Samuel Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601; with service copies mailed to Hon. Debra H. Dawahare and Hon. Leila G. O'Carra, Wyatt, Tarrant & Combs, LLP, 250 West Main Street, Suite 1600, Lexington, Kentucky, 40507-1746, and Hon. Hunter Daugherty, Jessamine Circuit Court, 101 North Main Street, Nicholasville, Kentucky, 30256, all on this the 10 day of February, 2015.

Debra Ann Doss
DEBRA ANN DOSS
ATTORNEY FOR APPELLEES

APPELLEES' STATEMENT AS TO ORAL ARGUMENT

Appellees do not believe oral argument to be necessary to the Court's review of this matter, but have no objections to oral argument if there are legal or factual issues presented not fully addressed by the parties.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellee does not accept Appellant's Statement of the Case.

Deborah A. Powell was associated with Asbury College for twenty years as a student, three sport athlete, assistant coach, and head coach of Asbury's Women's Basketball team. In 2005, Powell began making verbal and written complaints to Asbury administration about gender discrimination regarding the less favorable treatment she received as compared to the other head coaches, all of whom were male. Powell continued voicing her complaints, to no avail, as late as January 2008.

In early February, 2008, Powell was advised by the Athletic Director Gary Kempf and Provost Jon Kulaga that there were allegations from some of her players of an inappropriate relationship between Powell and her female assistant coach, Heather Hadlock. These allegations were based on innocent behaviors which included hand-holding during prayer, consoling hugs or pats, and incidental touching, all of which were common among both male and female athletes at Asbury, as well as the entire Asbury Community. Kempf and Kulaga seized upon this opportunity to get rid of Powell because of her ongoing complaints of gender discrimination. Powell was immediately banned from campus, never allowed to talk to any member of her team, and was terminated a few weeks afterward.

Powell later learned that both Athletic Director Kempf and Provost Kulaga had heard of these "gay" rumors in the fall of 2007, yet had never told Powell and had allowed the rumors to grow unbeknownst to Powell. Kempf also refused to follow the

directions of the Human Resource Director to quell the rumors, and advise Powell so she could address any misperceptions.

There was direct evidence of discussions between Athletic Director Kempf and Provost Kulaga about Powell's prior complaints of gender discrimination at the very same time the Provost made the decision to terminate Powell in February, 2008. The Provost then made false reports of his investigative findings regarding Powell and then destroyed all investigative notes and emails.

Powell filed claims of gender discrimination and retaliation pursuant to the Kentucky Civil Rights Act in the Jessamine Circuit Court. At trial, the jury found in favor of Asbury on Powell's gender discrimination claim. However, the jury specifically found that Powell had made good faith, reasonably based complaints of gender discrimination and returned a verdict for her on her retaliation claim. The jury instructions for retaliation included the "but for" causation standard and were proper under both state and federal laws. There was no evidence of jury misconduct and all evidence presented was proper. The verdict in Powell's favor should be upheld.

Factual Summry

For three generations, Appellee Deborah A. Powell's family had attended Asbury College. Appellee (hereafter Powell) was a 1993 graduate of Asbury before becoming Asbury's assistant women's basketball coach. In 2002, she became the head women's basketball (WBB) coach, which was a part-time position (VR 2: 1/30/12: 01:19:35-01:27:45). In January, 2003, despite Powell's reservations, she was urged to accept the role of the Intramural Coordinator (IMC), in addition to WBB head coach, which made her a full-time employee of Asbury (VR 2: 1/30/12: 01:30:57). Her reservations were

based on the fact that no other head coach had ever been assigned the duties of IMC and the other full-time head coaches, all of whom were male, had either teaching duties or other non-conflicting miscellaneous duties to complete their full-time package (VR 2: 1/30/12: 01:19:35-01:32:07-01:33:50).

Powell soon discovered her IMC duties conflicted with her head coaching duties, caused her to work excessive hours, and often made her unavailable for her primary duties as WBB head coach (VR 2: 1/30/12: 01:35:10; 01:55:40). Accordingly, over the next 2 ½ years, Powell repeatedly communicated with her supervisor, Dr. Barry May, both verbally and ultimately in a 13 page memo in May, 2005, that her workload was excessive and her job structure as WBB coach and IMC conflicted. She specifically addressed the issue of gender discrimination in her job assignments, as compared to the other male head coaches, in her May, 2005 memo to Dr. May, the new Athletic Director (AD) Gary Kempf, and Human Resource (HR) Director Glenn Hamilton (VR 2: 1/30/12: 01:38:05-01:55:40). Among other things, Powell complained that the two male head coaches assigned to assist her with her IMC duties were not required to do any IMC work during their sports season, in contrast to Powell. AD Kempf's response to Powell's complaints was that these male coaches were like all men and wanted to focus on their own team; that one of the male coaches had a wife and baby at home and could not work the afternoon/evening intramural hours to assist Powell, even though he was being paid to do so; and that "boys will be boys" (VR 2: 1/30/12: 01:58:42).

In the fall of 2005, Powell initiated a formal written grievance, after Powell's informal complaints resulted in no corrective action by Asbury. In this written grievance, Powell complained of gender discrimination in her work load and job structure, as

opposed to the other male coaches, which resulted in meetings with the Provost and then President, Dr. Paul Rader. As a result of this grievance process, Dr. Rader simply advised Powell to "hang in there" and work out her concerns with AD Kempf (VR 2: 1/30/12: 02:01:03-02:11:10).

A pattern of retaliation against Powell began soon thereafter. In late 2005 and in 2006, Powell proposed to AD Kempf that she relinquish her IMC duties and take over the part-time ground keeping duties that had been vacated by another male coach to comprise her full-time package. When this proposal was rejected, she proposed giving up IMC duties and full-time employment package, and only continuing as the head WBB coach, which would make her part-time. However, Dr. May made it clear that if she gave up her IMC job, she would have to give up coaching, even though other male coaches were allowed to coach on only a part-time basis (VR 2: 1/30/12: 01:19:35-02:12:30-02:14:30). At this point, Powell chose not to file any more written grievances because she was afraid of getting fired and instead she directed her complaints verbally to AD Kempf as President Rader had directed (VR 2: 1/30/12: 02:14:30).

From 2006 and through January, 2008, Powell complained of gender discrimination to AD Kempf on multiple issues which affected her success as a coach, specifically: that the male coach for the men's basketball team received his media guide pre-season while her media guide came out mid-season; that she was not allowed to rollover money in her annual budget for team trips helpful to recruiting, as the male basketball coach was allowed; and that the male basketball coach was given preferential scheduling of his team's games as compared to the women's games (VR 2: 1/30/12: 02:16:28-02:28:04). In the fall of 2007, Powell specifically complained to Kempf that she

was tired of being patient, in reference to her job restructuring and work hours as both IMC and WBB head coach. AD Kempf admitted to her that he was aware of the gender inequity and asked her to continue to be patient (VR 2: 1/30/12: 02:18:25). In December, 2007, Powell learned that Kempf had scheduled coaches' meetings with an outside auditor for an audit required for evaluation of the athletic programs. However, these meetings with the auditor were scheduled during a time period that Kempf knew Powell would be out of state (VR : 1/30/12: 02:41:21). When Powell asked to participate in the auditor's meeting by speakerphone so that her input, as the only female coach at Asbury, would be considered, Kempf refused without explanation. In early January, 2008, Powell asked Kempf for the contact information for the auditor. AD Kempf again refused and Powell complained to Kempf of gender discrimination in denying her access to the auditor (VR 2: 1/30/12: 02:41:21-02:44:16).

Only a few weeks later, on February 8, 2008, Powell was advised by Kempf that three of her players had made allegations of misconduct between her and her assistant coach, Heather Hadlock (Hadlock), stemming from a team bus trip to Berea, Kentucky, on February 7, 2008. Kempf admitted that the players were "confused" about what they had seen on the bus trip. Powell explained that Hadlock had been crying and Powell had held hands with Hadlock in prayer and patted Hadlock's arm to console Hadlock. Nevertheless, Kempf directed Powell not to come to that day's practice or the next day's game, to stay off campus, and not to contact any of her players (VR 2: 1/30/12: 03:00:05-03:11:21). Kempf then told Powell of allegations of inappropriate conduct with Hadlock in September, 2007, which were based on the side of Powell's leg touching Hadlock's leg during a prayer session with a player. Kempf also advised Powell of allegations of

inappropriate conduct when Powell had put her arm around Hadlock's shoulder during a hospital visit with an injured player (VR 2: 1/30/12: 03:11:21). Powell unequivocally denied any inappropriate conduct, explained that all of these situations were innocent, and that any touching was incidental and/or in prayer. Powell further explained to Kempf that the players making these complaints were upset with Powell about team-related decisions, and that one player making the allegations had claimed to know a lesbian by appearance only (VR 2: 1/30/12: 03:11:21-03:24:10). Kempf then urged Powell to resign and stated that despite the outcome of any yet-to-be conducted investigation, it was his position that she should leave Asbury. Kempf also stated to Powell that he would recommend to Provost Kulaga that she be terminated regardless of what an investigation found (VR 2: 1/30/12: 03:24:10).

Powell was next advised by Provost Kulaga by e-mail on February 11, 2008, that she was on administrative leave; that he was denying her repeated requests to talk to her players; and that she was banned from campus (VR 2: 1/30/12: 03:24:30). Powell was not given an opportunity to speak directly to Provost Kulaga until February 19, 2008, at which time she responded to each of the allegations with reasonable and innocent explanations. She again urged Kulaga to let her speak to the team so that she could explain her innocent behavior and work toward reconciliation, rather than allowing the situation to fester. Nevertheless, Kulaga still refused her requests (VR 2: 1/30/12: 03:15:01). On February 29, 2008, Kulaga told Powell that all of her players had viewed her and Hadlock's conduct as inappropriate; that none of them wanted her as their coach; that she was being permanently removed from all duties at Asbury; and that she could not contact any of her players (VR 2: 1/30/12: 03:56:10).

In direct contradiction to Kulaga's testimony, one of the WBB players, Allison Smith, testified that she advised Kulaga in the team meeting on February 8, 2008, that she did not believe the gossip about Powell and Hadlock; that she had never seen any inappropriate conduct; that she wanted Powell to remain as coach; and that at least one other player told Kulaga that they wanted to talk to Powell and "hear her side" (VR 4: 1/31/12: 03:50:02-04:05:28). However, Kulaga told Smith and the team not to contact either coach (VR 4: 1/31/12: 04:10:05).

Further evidence was presented at trial that AD Kempf and Provost Kulaga intentionally allowed false rumors about Powell to spread unchecked and that they disregarded the instructions of Asbury's Human Resource Director, Glenn Hamilton. Mr. Hamilton testified that in the fall of 2007, Kempf advised Hamilton of rumors of an alleged inappropriate relationship between Powell and Hadlock. Hamilton testified that he specifically instructed Kempf to put an end to the rumors **and** to tell Powell about the rumors so that Kempf and Powell could address any misperceptions about inappropriate conduct (VR3: 1/31/12: 10:20:20). However, Kempf refused to follow Hamilton's instructions and did nothing, allowing the rumors to persist without Powell's knowledge. (VR5: 2/01/12; 11:15:31 11:17:55). Provost Kulaga also admitted to prior knowledge of these rumors and that he considered these rumors "potentially serious." However, Provost Kulaga admitted that he did nothing to quell the rumors and did not advise Powell so that she could do so (VR3: 1/31/12; 03:31:04).

Provost Kulaga and AD Kempf then seized upon the opportunity to get rid of Powell in February, 2008, ignoring Asbury's policies and protocol concerning the investigation of complaints. For example, H.R. Director Hamilton testified that Powell

was treated differently than any other coach in being denied the opportunity to speak to her team; being locked out of her office; being banned from campus; and not allowed to attend practices or games (VR3:1/31/12; 10:5219; 10:55:20). Kulaga refused to follow Asbury's policy by not appointing a three person committee to investigate the allegations against Powell as HR Director Hamilton had advised and written policy required (VR 3: 1/31/12: 10:24:02). Moreover, Provost Kulaga disregarded HR Director Hamilton's input that he had known Powell for 20 years, socially and professionally; that he had never seen her act in any inappropriate way with Heather Hadlock or anyone else; and that he did not believe the allegations against her (VR 3: 1/31/12:02:07:21-02:08:40; 10:24:02; VR 5: 2/1/12: 09:48:41; 09:51:55). Furthermore, Powell's players were **never** informed by Kulaga or Kempf that Powell wanted to talk to them or that Powell had an explanation for her conduct (VR 7: 2/2/12: 11:57:10-11:58:15).

Most significantly, evidence at the trial revealed that Kulaga falsely reported to Powell and the Asbury administration that all 15 team members of Powell's team agreed that Powell's conduct was inappropriate and that they all wanted her removed as coach. Even more astounding, Kulaga admitted that he destroyed his investigative notes and e-mails regarding Powell (VR 3: 1/31/12: 02:00:09; 02:16:50; See Smith testimony, supra). Fortunately, another Asbury employee, co-investigator, Judi Kinlaw, did not destroy her notes. Judi Kinlaw testified that she had been asked by Provost Kulaga to be present at some of the investigative meetings Kulaga conducted in February, 2008 with a few of the WBB team members and with AD Kempf about the allegations against Powell. In one of these February, 2008 meetings, Kinlaw testified that AD Kempf and Provost Kulaga specifically discussed Powell's 2005 grievance; Powell's complaints of gender

discrimination; and Powell's prior threat to file a lawsuit. This discussion occurred only days before Powell's termination and established direct evidence of a causal connection between Powell's prior complaints of gender discrimination and her termination (RA Exhibit Folder, JX 30; VR 4: 2/1/12: 01:28:08).

Procedural History

This litigation, pending for more than 3 years, was tried to a jury over four (4) days, commencing on January 30, 2012. Powell asserted claims of gender discrimination in the terms, conditions, and privileges of her employment with Asbury College and a separate claim of retaliation, both claims being based upon the statutory provisions of the Kentucky Civil Rights Act KRS 344. (Complaint, RA 2-11). At the conclusion of trial, the jury returned its verdict, finding for Asbury on the gender discrimination claim, but finding for Powell on her claim of retaliation as a result of her good faith complaints of gender discrimination. The jury unanimously awarded Ms. Powell the sum of $88,325.97, the maximum amount provided for under the instructions for her lost wages and benefits. The jury further unanimously awarded Powell the sum of $300,000.00 for her humiliation, embarrassment and emotional distress, for a total verdict in favor of Powell of $388,325.97. Judgment was entered upon the verdict on February 15, 2012 (See Order and Judgment, RA 677-680; 681-682; Apx. 2). Post-trial motions were heard by the trial court on March 8, 2012, and a Supplemental Judgment was entered March 19, 2012, denying Asbury's motion for judgment notwithstanding the verdict or for new trial, and awarding Powell attorney fees and costs (RA 1186-1187; Apx 3).

Asbury appealed the Order and Judgment and Supplemental Judgment. On January 31st, 2014, the Court of Appeals unanimously affirmed the rulings of the Jessamine Circuit trial court in its entirety (Apx.1). Asbury did not file a Motion for Reconsideration or a Petition for Rehearing. Asbury did file a Motion for Discretionary Review, which was granted by order of this Court dated October 15th, 2015.

In its Motion for Discretionary Review, Asbury University (hereafter Asbury), primarily argued that the Court of Appeals erred in affirming the jury verdict regarding Powell's retaliation claim pursuant to the Kentucky Civil Rights Act because of the United States Supreme Court decision in *University of Texas, Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013) (hereafter "Nassar", Apx. 4). Asbury's two main arguments in its Motion for Discretionary Review were that 1) Powell could not receive a verdict for retaliation if her underlying discrimination claim was unsuccessful; and 2) that the jury instructions in Powell's case were inconsistent with the "but for" causation standard set forth by *Nasser* for retaliation claims under Title VII. However, Powell respectfully submits that Asbury's arguments fail because even if this Court adopts the *Nassar's* "but for" causation standard for retaliation claims, the Court of Appeals properly affirmed the trial court's jury instructions which specifically included the "but for" causation language. Moreover, if this Court decides to follow the *Nassar* decision in analyzing retaliation claims, *Nassar* confirms the well-established view under both Kentucky and federal law that retaliation claims are separate and distinct claims not dependent upon an underlying discrimination claim. Thus, the Court of Appeals fully considered the *Nassar* decision in its Opinion when it found that the jury award to Powell for her retaliation claim was proper even though Powell did not succeed with her gender

discrimination claim. The Court of Appeals also properly affirmed the jury instructions for retaliation which were consistent with *Nassar* and Kentucky case law, were not improper, and did not prejudice Asbury. All remaining miscellaneous issues argued by Asbury in its Brief to this Court are without merit and were properly addressed by the trial court and the Court of Appeals.

ARGUMENT

I. EVEN IF THE "BUT FOR" CAUSATION STANDARD IS APPLIED TO KENTUCKY CIVIL RIGHTS RETALIATION CLAIMS, THE POWELL JURY INSTRUCTIONS WERE PROPER.

The jury instructions in Powell's case were submitted as follows:

"To prevail on her claim of retaliation, Ms. Powell must prove that;

1. She engaged in protected activity by complaining about gender discrimination.

2. She had a good faith, reasonable basis for her complaints.

3. She suffered material adverse employment action in connection with her employment.

4. Asbury University officials responsible for the action against Deborah Powell were aware of Deborah Powell's complaints of gender discrimination.

5. Deborah Powell's complaining about gender discrimination was a substantial and motivating factor in the adverse employment action, and

6. **But for** her complaining about gender discrimination she would not have suffered the adverse employment action". (emphasis added) (VR 8: 2/02/12: 03:34:35).

If this Court adopts the federal "but for" causation standard for retaliation set forth in *Nassar* for Title VII cases, the jury instructions in Powell's case were consistent with *Nassar* and do not prejudice Asbury. Under the *Nassar* standard, the jury

instructions in the case at bar were proper because the sixth and final component of jury instructions for retaliation required the jury to find that "6. *But for* her (Powell) complaining about gender discrimination she would not have suffered the adverse employment action" (VR 8: 2/02/12: 03:34:35). Although the preceding jury instruction, No. 5, stated that Powell must prove that her complaints about gender discrimination were a "substantial and motivating factor in the adverse employment action", this language was immediately followed by "and 6. *But for* her complaining about gender discrimination she would not have suffered the adverse employment action." (emphasis added).These were progressive instructions and the jury ultimately was required to apply the "but for" causation standard to Powell's retaliation claim. Thus, Powell's jury instructions met the *Nassar* standard because of instruction No. 6. It did not matter that Powell's jury instruction No. 5 used the "substantial and motivating factor" language, because in the final analysis the instructions proceeded to require a "but for" causation standard in instruction No. 6.

A.) Kentucky Case Law Has Distinguished The Standard of Proof Under The Kentucky Civil Rights Act From Federal Claims Under Title VII.

The above instructions given by the trial court contained the essential elements of the model jury instructions found in Palmore and Cetrullo, Kentucky Instructions to Juries, Civil § 45.07 (5th Ed., Release No. 4, June 2009):

"You will find for P if you are satisfied from the evidence that at least one of the following was a substantial and motivating factor in D's decision to discharge her, but for which he would not have been discharged."

Asbury contends that these instructions were improper as a "mixed motive" analysis which is not cognizable for retaliation claims brought under Title VII. However, Ms. Powell's claim of retaliation was not brought under Title VII but under the Kentucky Civil Rights Act. In *Mendez v. University of Kentucky Board of Trustees*, 357 S.W.3d 534. (Ky. App. 2011) (Apx. 5), the Kentucky Court of Appeals specifically held that "the Kentucky Civil Rights Act does not distinguish between the proof necessary to prevail in a single or mixed motive case" (Mendez @ 543). In so holding, the Court reaffirmed the holdings of *Meyers v. Chapman Printing Co. Inc.*, 840 S.W.2d 814 (Ky. 1992) and *First Property Management Corp. v. Zarebidaki*, 867 S.W.2d 185 (Ky. 1993) and approved and upheld the use of "substantial and motivating factor" language in the jury instructions as non-prejudicial and an accurate statement of the law in Kentucky for proceedings under the Kentucky Civil Rights Act. In this particular area of law regarding jury instructions, Kentucky law is distinct from federal law, which enacted new legislation amending Title VII. Kentucky has declined to adopt this new legislation, as discussed in *Mendez*, supra, and therefore, Kentucky law is still controlling. The decisions in *Meyers*, *First Property*, and now *Mendez* are viable for claims brought under the Kentucky Civil Rights Act and hold that the "substantial and motivating factor" language does not misstate the law in Kentucky. Accordingly, the instructions given by the Court in this action complied with prevailing Kentucky case law, did not mislead the jury, and are legally correct for Kentucky cases brought under the Kentucky Civil Rights Act and tried to a jury.

B.) The Nassar Decision Does Not Impact Kentucky Jurisprudence.

Asbury contends that the Kentucky Court of Appeals erred in failing to retroactively apply the recent United States Supreme Court decision of *Nassar*. First, this contention is

erroneous because the *Nassar* decision does not implicate, change, or modify Kentucky jurisprudence regarding state law claims brought under the Kentucky Civil Rights Act, KRS Chapter 344, (KCRA) because *Nassar's* holding is restricted to **federal claims** of retaliation brought under the provisions of **Title VII**. *Nassar* is predicated entirely upon the Court's statutory construction and interpretation of the 1991 amendments to the Federal Civil Rights Act. These amendments were never enacted by Kentucky and were never adopted or incorporated into the provision of the KCRA, under which this case was tried.

Secondly, Asbury's argument regarding this issue is foreclosed by the Kentucky Court of Appeals decision in *Mendez, supra,* which explained the differences between KCRA and Title VII as well as when federal case law is persuasive and when it is not. In *Mendez*, the Kentucky Court of Appeals reaffirmed the holdings of *Meyers, supra* and *First Property, supra,* that the KCRA statutory language "because of" does not mean "solely because of" causation. *Mendez* specifically addressed the impact of the 1991 amendments to the Federal Civil Rights Act, which is the sole focus of *Nassar*, and concluded that federal case law was not determinative as Kentucky had never adopted the statutory amendments of Title VII into the provisions of the KCRA. *Mendez* further clarified that under Kentucky law, there is no distinction between the proof required to prevail under either a single or mixed-motive case. *Mendez* also reaffirmed *Meyers, supra*, stating that the "but for" jury instruction did not require a finding of sole cause, and that jury instructions stating "substantial and motivating", but not sole, were proper under KCRA.

Asbury's fatal flaw is its continued attempt to treat this case as one arising under the statutory framework of Title VII, rather than state law claims brought under the statutory provisions of the KCRA. The Kentucky decisions of *Myers, supra, First Property, supra,* and *Mendez, supra,* are determinative of the causation issues in this matter and the trial court's jury instructions complied with same in Powell's case. Accordingly, because the decision of *Nassar* does not change or impact the law pertaining to Kentucky jury instructions, there is, in fact, no issue to be addressed by this Court and the Court of Appeals' decision was correct on this point of law.

C.) The Jury Instructions Were Proper Under Both Kentucky And Federal Law

Under Powell's jury instructions, it was not enough for the jury to find that Powell's complaints of gender discrimination were a substantial and motivating factor in the adverse employment action (No. 5). The jury also had to find "but for her complaints, Powell would not have suffered the adverse employment action." (No. 6). Accordingly, the jury instructions given by the trial court, and approved by the Kentucky Court of Appeals, are consistent with 22 years of established Kentucky case law, commencing with *Meyers, supra*, and are further in conformity with the *Nassar* decision, assuming that its statutory construction of Title VII amendments, not adopted under the Kentucky Civil Rights Act, is applicable to state law claims of retaliation. Therefore, whether this Court adopts *Nasser* or follows prior Kentucky case law, the instructions in Powell's case were proper and did not mislead the jury.

D) If the Federal Nassar Standard is Adopted, It Should Not Be Applied Retroactively to The Case at Bar.

If this Court does adopt the "but for" causation standard for retaliation claims, said

standard should not be applied retroactively to the KCRA retaliation claims of Powell. As discussed herein, *Nassar* interpreted the 1991 amendment to Title VII that was in effect when the *Nassar* case was tried. However, Kentucky never adopted the 1991 amendments to Title Vii, as discussed in *Mendez, supra*. In the case at bar, the jury instructions given by Judge Daugherty unquestionably were proper under Kentucky law at the time of Powell's trial. Nassar was not rendered until months after the Powell trial. Since Nassar did not interpret an amendment that is contained in the KCRA, there is no justification or equity in applying the Nassar standard retroactively to the Powell case.

E) Powell's Retaliation Claim Succeeds Because Powell Produced Substantial Evidence of Pretext and of Causal Connection

A *prima facie* case of retaliation under the KRS 344.280(1) requires a showing that: (1) the plaintiff engaged in a protected activity; (2) the exercise of civil rights was known by the defendant; (3) the defendant thereafter took an employment action adverse to the plaintiff; and (4) there was a casual connection between the plaintiff's protected activity and the defendant's adverse employment action. *Brooks v. LFUCHA*, 132 S.W.3d 790, 803 (Ky. 2004). If there is no direct evidence of a casual connection and the employer articulates a non-retaliatory reason for the adverse action, then the plaintiff is to be given the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for [retaliation]." *Ky. Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 134 (Ky. 2003) (internal quotation marks omitted; alteration in original).

Powell clearly engaged in protected activity when she voiced her complaints of gender discrimination over a two and one-half (2 ½) year period from May, 2005 to January, 2008; Asbury unequivocally knew of these further complaints; and Powell definitely

suffered adverse employment action. To support her claim of retaliation, Powell was required to produce evidence from which an inference of pretext could be drawn as to Asbury's stated reasons for the adverse employment action it took against Powell. Powell did produce substantial evidence in support of the pretextual nature of Asbury's actions, including, but not exclusively, the following:

1. Both AD Kempf and Provost Kulaga knew of the rumors regarding Powell being gay in the fall of 2007 yet they took no action to quell the rumors or to advise Powell about the rumors even though HR Director Glenn Hamilton directed Kempf to do so. (VR 4: 1/31/12: 03:31:04; VR 5: 2/01/12; 11:15:31-11:17:55).
2. Kulaga destroyed his notes and emails regarding his investigation of the allegations made against Powell. (VR 3: 1/31/12: 02:00:09; 02:16:50).
3. Kulaga refused to allow Powell to tape record their meeting and Kulaga refused to allow Powell to have any support person present at their last meeting, even though Dr. Rita Pritchett and HR Director Glenn Hamilton were unaware of any other employee denied this request (VR 3: 1/31/12: 01:35:20; 10:56:27).
4. Kempf and Kulaga refused to grant Powell's request to have HR Director Glenn Hamilton present at their respective meetings with Powell in February, 2008. Hamilton testified that he had never been denied the opportunity to be present at similar meetings with other employees (VR 2: 1/30/12: 03:11:13; 03:43:20; VR 3: 1/31/12: 10:53:45).

5. Kulaga failed to follow Asbury policy in appointing a 3 person committee to investigate the allegations against Powell as HR Director Hamilton had advised. (VR 3: 1/31/12: 10:24:02).
6. Kempf refused Powell's offer to let him review her emails, text messages, telephone calls, or to look at anything he wanted to prove that she was not gay or in any kind of inappropriate relationship (VR 2: 1/30/12: 03:00:05-03:04:15).
7. According to Glenn Hamilton, Powell was treated differently than any other coach in being denied the opportunity to speak to the team; being locked out of her office; being banned from campus; and not allowed to attend practices or games (VR 3: 1/31/12: 10:52:19; 10:55:20).
8. That on February 22, 2008, and prior to any final decision regarding Powell, Kempf told Kulaga that Powell had threatened a lawsuit in 2005 in reference to her grievance claiming gender discrimination (VR 5: 2/01/12:11:23:05; VR 7: 2/2/12: 09:31:05)
9. Provost Kulaga was aware of Powell's complaints of gender discrimination from Glenn Hamilton before any decisions were made regarding Powell's employment in February, 2008 (VR 3: 1/31/12: 10:24:02;01:55:05; VR 5: 2/1/12: 09:43:24).
10. Provost Kulaga disregarded HR Director Hamilton's input that he had known Powell for 20 years, socially and professionally; that he had never seen her act in any inappropriate way with Heather Hadlock or anyone else; and that he

did not believe the allegations against her (VR 3: 1/31/12:02:07:21-02:08:40; 10:24:02; VR 5: 2/1/12: 09:48:41; 09:51:55).

11. That the bus driver on the February 7, 2008 Berea bus trip, Paul Southgate, admitted that his observations of Powell and Hadlock on the Berea bus trip were **only** that Powell touched Hadlock's shoulder and/or arm and that it appeared Powell was trying to console Hadlock, who was crying (VR 5: 2/1/12: 02:23:08-02:25:01).

12. That Powell's players were **never** informed by Kulaga or Kempf that Powell wanted to talk to them or that Powell had an explanation for her conduct (VR 7: 2/2/12: 11:57:10-11:58:15).

13. That Kulaga made false representations when he made findings that **all** 15 team members agreed that Powell's conduct was inappropriate and that they all wanted her removed as coach (See Smith testimony, supra).

Asbury also contends that Powell provided no evidence at trial to support a causal connection between her gender complaint made in 2005 and the actions taken by Asbury administration in February, 2008. This contention is without merit for several reasons:

First, there is no "bright line" rule in Kentucky regarding temporal proximity between protected activity and retaliatory adverse employment action. *Dollar General Partners v. Upchurch,* 214 S.W.3d. 910 (Ky. App. 2006).

Second, Asbury's argument ignores the testimony of Powell regarding her ongoing gender discrimination complaints made after 2005 that she made regarding her repeated requests for job restructuring. Powell made numerous ongoing complaints of disparate gender based treatment which continued and intensified in the fall of 2007 and into early

2008, only a few weeks prior to her termination (See Counterstatement of Case herein).

Third, the contention by Asbury that there was no evidence that Provost Kulaga knew of Powell's complaints of gender discrimination was refuted by the testimony of Glenn Hamilton, Asbury's HR Director. Mr. Hamilton testified that he told Dr. Kulaga about Ms. Powell's prior complaints of gender discrimination on the morning of February 8, 2008, when the allegations of inappropriate conduct against Ms. Powell first surfaced. (VR 3: 1/31/12:10:20:04). **Dr. Kulaga further admitted being aware of Ms. Powell's prior complaints of gender discrimination and that he was told by Kempf that Ms. Powell had threatened a lawsuit regarding her complaints prior to his decision to terminate her** (VR 3: 1/31/12:01:55:05). Moreover, during the course of the purported investigation by Dr. Kulaga of the allegations against Ms. Powell, A.D. Gary Kempf, Provost Jon Kulaga and Judi Kinlaw had a meeting in which Judi Kinlaw made handwritten notes. These notes were part of the joint exhibits introduced at trial and were marked Joint Exhibit 30 (RA Exhibit Folder, JX 30). These notes, taken on February 22, 2008, and the testimony of Kempf and Kulaga confirmed that Kempf discussed with Dr. Kulaga and Kinlaw the history of Ms. Powell's having made gender discrimination complaints in 2005, and that Ms. Powell had threatened a lawsuit regarding her complaints. Gary Kempf conceded in his trial testimony that this discussion took place at the very same time he and Dr. Kulaga were discussing the allegations of inappropriate conduct against Ms. Powell (VR 4: 2/1/12:01:28:08). The jury rightfully concluded that these notes and the testimony of Kempf, Kulaga and Kinlaw causally connected Ms. Powell's prior gender discrimination complaints to the decisions made placing Ms. Powell on administrative leave, excluding Ms. Powell from talking with her team; not

telling the team of Powell's explanation of her conduct with Ms. Hadlock, and Asbury's ultimate decision to terminate Ms. Powell. Powell submits that this evidence, even standing alone, is sufficient as a matter of law to permit the jury, as trier of fact, to infer that Powell's complaints of gender discrimination were causally related to the adverse employment actions taken against her by Asbury in February, 2008.

II."MOTIVATING FACTOR" LANGUAGE IN THE KCRA RETALIATION JURY INSTRUCTIONS DOES NOT INVALIDATE THE INSTRUCTIONS.

If the Court adopts the *Nassar* "but for" standard, Powell's jury instructions are still correct since the jury's ultimate determination was to decide whether the adverse employment action would have been taken against Powell but for her complaints of gender discrimination, as discussed hereinabove. The "but for" retaliation causation standard as set forth in Powell's instruction No. 6 did not conflict with the "substantial and motivating" language of Powell's instruction No.5. Instruction No. 6 simply asked the jury to go one step further in its analysis of causation, which is exactly what the *Nassar* decision did.

Asbury also argues that the retaliation jury instructions were improper because Dr. Kulaga was not specifically referenced as the decision-maker. However, there is no requirement that the specific identity of the decision-maker be included in the instruction. Adverse employment action could only be taken by the employer, Asbury, through its designated, authorized agent(s). In the case at bar, Asbury's decision-maker was Provost Kulaga with input from AD Kempf. There could be no confusion in the jury's mind that the "but for" instruction No. 6 was referring to adverse employment action taken by Asbury and it was not necessary to name Provost Kulaga, who was not a named defendant.

Since the jury instructions in the case at bar are not erroneous or conflicting, there is no harm or prejudice to Asbury. The Court of Appeals correctly held that the jury was not misled even when the *Nassar* standard was applied.

III. THE COURT OF APPEALS PROPERLY FOUND THAT POWELL DID NOT HAVE TO PREVAIL ON HER DISCRIMINATION CLAIM IN ORDER TO PREVAIL ON HER CLAIMS OF RETALIATION.

Asbury's contention that Ms. Powell's retaliation claim must fail as a matter of law because she did not prevail at trial on her claim of gender discrimination is not supported by persuasive case law or precedent. The cases relied upon by Asbury were fully addressed and distinguished by Powell in her Brief to the Court of Appeals. The first case cited by Asbury, *Parker v. Pediatric Acute Care, P.S.C.*. No. 2007-CA-000548-MR (Ky. App. 2008), is an unpublished opinion and has no precedential value. The issue in *Parker* was whether a one time gag gift given by female co-workers to a female employee, consisting of a gift card to an adult sex shop, was actionable as a sexually hostile work environment. The *Parker* Court properly concluded that an action could not be sustained as a matter of law. In regard to the retaliation claim, the Court also found summary judgment appropriate as there was no causal connection between the gag gift she received and her subsequent termination of employment. *Himmelbeber v. ev3, Inc.* Civil Action No. 3:07-CV-593-H (W.D. Ky. 2008) has no relevance herein as it involved an FRCP 12(b)(6) motion to dismiss based on the Plaintiff's failure to sufficiently allege that the defendant was an employer for purposes of the Kentucky Civil Rights Act and the discriminatory acts complained of occurred outside of Kentucky. Similarly, *Thompson v. Next-tec Finishing, LLC.,* Civil Action No. 3:09CV-940-S (W.D. Ky. 2010), presented a motion for judgment on the pleadings under FRCP 12(c) where the court

found that the only discriminatory action alleged was the plaintiff's termination, the court finding that the plaintiff could not have been fired for complaining about being fired. These cases present unusual factual issues distinct from Powell's case and/or are inconsistent with prevailing state and federal law.

Furthermore, KCRA does not require a person to successfully prove the underlying discrimination claim as an element of retaliation.

> ***KRS 344.280(1) states as follows:***
> ***It shall be an unlawful employment practice for a person, or for two or more persons to conspire or retaliate or discriminate in any manner against a person because he has opposed a practice declared unlawful by this chapter, or because he has made a charge or filed a complaint.***

Powell undisputedly opposed a practice declared unlawful by this Chapter, i.e. gender discrimination. She filed a written complaint alleging same in 2005 followed by numerous and ongoing verbal complaints of gender discrimination through January, 2008, as summarized in her Counterstatement of Facts hereinabove. Her claim of retaliation under the KCRA has independent statutory authority and requires different elements of proof than those for a claim of unlawful discrimination, which was recognized in *Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130 (Ky. 2003), wherein the jury verdict on the retaliation claim was upheld even though the gender discrimination claim failed at trial.

In the case at bar, the Court of Appeals correctly pointed out in its Opinion herein that the U.S. Supreme Court in *Nassar* made it clear that retaliation is a separate cause of action and requires different elements of proof from discrimination claims. (*Nassar, supra* @ 133 S.Ct. 2532). The *Nassar* Court analyzed the retaliation claim and remanded

the retaliation claim for further proceedings even though the underlying gender discrimination claim was not upheld. (*Nassar, supra* @ 133 S.Ct. 2532, 2534). On one hand, Asbury argues that *Nassar* should be followed as to the "but for" causation standard but then wants this Court to ignore *Nassar's* treatment of retaliation claims which are not dependant on successful discrimination claims.

In *Burlington N. & Santa Fe Ry. Co. v. White,* 126 S.Ct. 2 405 (2006) (Apx. 6), the Court held that to be actionable, a retaliatory act need only be materially adverse, meaning that the action might dissuade a reasonable person from making or supporting a discrimination charge. **The Court also clarified that "this standard does not require a reviewing court or jury to consider "the nature of the discrimination that led to the filing of the charge. Rather, the standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint**". *Burlington, supra*, at 548 U.S. 69. In *Thompson v. North American Stainless, L.P.*, 131 S.Ct. 863, 178 L.Ed.2d. 694 (2011), the U. S. Supreme Court held that the anti-retaliation provisions of Title VII provided "third party protection" to individuals who did not have an actionable claim of discrimination. Thus, retaliation is viable even in the absence of a discrimination claim. Accordingly, Asbury's argument that Powell's retaliation claim fails as a matter of law is not supported by either state or federal law.

Asbury further argues that a retaliation claim requires a plaintiff's good faith, reasonable belief that the employer's conduct amounted to unlawful discrimination. This is not a requirement of KCRA or prior Kentucky case law. However, Asbury makes no reference to any facts that Powell did not have a good faith, reasonable belief that she was being discriminated against by Asbury because of her gender. To the contrary, there

was a plethora of evidence presented to the jury that Powell made numerous, good faith, written and verbal complaints of gender discrimination from 2005 through January, 2008. Most significantly, the retaliation instruction to the jury specifically required that the jury find **"2. She had a good faith, reasonable basis for her complaints"**. Not only was there evidence that Powell had a good faith, reasonable belief that gender discrimination had occurred, the jury instructions included this "good faith, reasonable basis" standard for the retaliation claim and the jury said "yes". However, Asbury provides no explanation as to why Powell's retaliation claim fails as a matter of law if this Court adopts the good faith, reasonable belief standard for KCRA claims.

IV. THE TRIAL COURT PROPERLY ALLOWED POWELL'S EVIDENCE OF GENDER DISCRIMINATION.

Powell's complaints of ongoing gender based disparate treatment in the terms and conditions of her employment with Asbury are summarized in Powell's Counterstatement of Case hereinabove. Asbury's contention that all of her complaints following 2005 were "petty" and "everyday work gripes" is simply Asbury's desired "spin."

KRS 344.010, "Definitions for Chapter", define discrimination as:

> ***(5) "Discrimination" means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter.***

In each and every instance, Powell's complaints in the fall of 2007 and January, 2008, reflected that she was being treated differently and less favorably than her male counterparts based on her gender and that this treatment adversely affected her ability to perform her duties as Asbury's women's basketball coach. These complaints were relevant because they evidenced a pattern and practice of less favorable treatment that

Powell received as compared to other male head coaches at Asbury and particularly the men's head basketball coach, who was male. These complaints also reflect a discriminatory lack of support and respect toward Powell as compared to her counterpart male head coaches at Asbury. The lack of support and disrespect was an integral part of the terms, conditions, and privileges of Powell's employment as a head coach at Asbury and impacted her ability to succeed in recruiting and team performance. Moreover, AD Kempf's refusal to allow Powell to participate in an audit of the athletic department in December, 2007 was no "petty gripe". Powell, as the only female head coach, wanted input into this audit, as all other male coaches were allowed to make. In January, 2008 Powell persisted in seeking the auditor's contact information from AD Kempf. Kempf blatantly refused prompting Powell to tell him that he was discriminating against her on the basis of her gender.

Finally, Asbury has failed to demonstrate how Asbury was prejudiced by the introduction of this evidence. Since Asbury prevailed on Powell's gender discrimination claim, there was no prejudicial reversible error committed by the trial court in allowing this evidence.

V. ASBURY'S MISCELLANEOUS REASONS FOR INVALIDATING THE JUDGMENT ARE WITHOUT MERIT.

A) Rita Pritchett's Testimony Was Relevant, Material and Competent.

By agreement of the parties, Dr. Rita Pritchett's deposition was read into evidence, although there were objections to portions of her testimony (VR 3: 1/31/12:01:26:45). Dr. Pritchett had unparalleled firsthand observations and experiences with Asbury and its athletic department. She had attended Asbury as a student and subsequently was employed at Asbury as a teacher/professor for 39 years in the HPERA department

(Health, Physical Education, Recreation and Athletics). She was Asbury's athletic director from 1988 – 1998 and had served as the head volleyball and softball coach (VR 3: 1/31/12:01:28:01).

As to the events of February, 2008, Dr. Pritchett was asked by assistant coach Heather Hadlock to be a witness at Hadlock's initial meeting with Provost Kulaga about the allegations of inappropriate conduct between Hadlock and Powell. Dr. Pritchett was a firsthand witness to Kulaga's description of the allegations presented to Hadlock and to Hadlock's explanation and/or response to each of the allegations. Based on Dr. Pritchett's firsthand experience, long-term observation of the Asbury community, and particularly female athletes and coaches, Dr. Pritchett testified that there was nothing in Ms. Hadlock's explanations or responses to Kulaga that caused Dr. Pritchett any concern that Hadlock had engaged in inappropriate conduct with Powell (VR 3: 1/31/12: 01:29:50-01:33:33). Dr. Pritchett also testified that based on all of her experiences and observations of female athletes at Asbury, it was not uncommon for them to hug, pat and touch each other, or give each other massages, and that she had observed similar conduct with *male athletes* at Asbury (VR 3: 1/31/12: 01:38:39). Thus, Dr. Pritchett was not presented as an expert, but as someone who had extensive and direct knowledge of Asbury athletics for nearly forty (40) years, and who was personally present to hear the allegations and responses between Kulaga and Hadlock in February, 2008.

B) Asbury Was Not Prejudiced by the Lack of an "At Will" Instruction.

Asbury's contention that it was "entitled" to an "at will" employment instruction is without merit. The sole issues presented at trial were 1) whether Powell was subjected to gender discrimination in the terms and conditions of her employment with Asbury, and 2)

whether Asbury unlawfully retaliated against Powell for her good faith reports of gender discrimination. Ms. Powell's status either as an "at will" employee or as a contract employee had no relevance to the legal issues presented to the jury, because "at will" employment status is not a defense to claims brought under KRS Chapter 344, the Kentucky Civil Rights Act. Accordingly, the Court did not commit reversible error in refusing Asbury's tendered instruction and Asbury has not and cannot demonstrate any prejudice it sustained in its defense of this action.

Asbury was not deprived of asserting any legitimate defenses at trial and Asbury was not denied or deprived from introducing any relevant and material evidence at trial. In fact, in Asbury's examination of Glenn Hamilton at trial, Hamilton testified that Powell was an at-will employee who could be fired for any reasons or for no reason (VR 3: 1/31/12:11:06:30). However, upon cross-examination, Hamilton admitted that being an at-will employee did not allow Asbury to discriminate on the basis of gender or to retaliate against one for making discrimination complaints (VR 3: 1/31/12:11:12:50).

Both federal and state cases have held that an "at will" employment status is not a defense to statutorily prohibited activity by an employer. An at-will employee can be fired without cause or for good cause. *Wymer v. JH Properties, Inc.*, 50 S.W.3d 195, 198 (Ky. 2001). However, the decision to fire an at-will employee must not be based on discriminatory or illegal reasons. *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (2008); *Federal Express Corp. v. Holowecki*, 128 SCt. 1147 (2008); *Talley v. Bravo Pitino Restaurant, Ltd*, 61 F.3d 1241, 1246 (6th Cir. 1995). In *Wymer, supra*, the Court held "Ordinarily an employer may discharge an at-will employee for good cause, for no cause, or for a cause that some might view as morally indefensible. *Production Oil Co.* v.

Johnson, Ky., 313 S.W.2d 411 (1958); *Scroghan v. Kraftco Corp.*, Ky.App., 551 S.W.2d 811 (1977). There are limitations on the at-will doctrine to provide protection from abuses. *Firestone Textile Co. Division v. Meadows*, Ky., 666 S.W.2d 730 (1983) and *Grzyb v. Evans*, Ky., 700 S.W.2d 399 (1985), recognizes a cause of action when an employee is terminated in contravention of statutory or constitutional provisions."

C. TheJury Did Not Render an Improper "Quotient Verdict".

Asbury's contention that the jury verdict rendered herein was improper and void as a "quotient verdict" is erroneous as a matter of law. In support of its post trial motions, Asbury attached the Affidavit of Janet B. Dean (RA Vol. 6, 803-804), an Associate Professor employed at Asbury, who alleged that she spoke to one of the jurors, Susan Morgan, following the trial herein. The Affidavit of Ms. Dean, stating what she was told by Ms. Morgan, was inadmissible hearsay. Nevertheless, even if the matters set forth in Ms. Dean's Affidavit are correct, they do not support Asbury's contention that the jury rendered an improper quotient verdict.

Murphy v. Cordle, 303 Ky. 229 (Ky. 1946) held "However, the jury may experiment in considering the amounts suggested by the various jurors if there is **no prior agreement** to be bound by the result as a quotient verdict. In other words, where there is **no antecedent agreement** by the jury to be bound by the resulting quotient, or, independently, it adopts an amount equal to the quotient after it is ascertained, the verdict is good". (*Murphy, supra* @ 233, emphasis added; internal cites omitted).

In *Schulz v. Chadwell*, 558 S.W.2d 183 (Ky.App. 1977), the jury was in disagreement as to the amount of damages to be awarded. The jurors each stated an amount they believed appropriate and then divided the total by twelve. The jurors then voted on

whether to accept the result as their verdict as to each item of damages and ten of the twelve voted to do so. There was no prior or antecedent agreement by the jurors to be bound by the quotient. The Court of Appeals held that the trial court did not commit error in refusing to grant a new trial as this did not constitute an impermissible quotient verdict.

In the most recent Kentucky case on point, *Wilkerson v. Williams*, 336 S.W.3d 919 (Ky.App. 2011), a negligent assault action, the plaintiff/appellant claimed that the jury had impermissibly altered its verdict and rendered a quotient verdict in favor of defendant after asking the court, by written question during its deliberations, about insurance coverage for medical expenses. On appeal, the Kentucky Court of Appeals held that, "we are unaware of any prohibition against a jury altering its verdict during the course of its deliberations. The concept of a quotient verdict is not applicable to these factual circumstances. A quotient verdict occurs when a jury **agrees in advance** to arrive at a verdict by averaging the individual amounts arrived at by each juror. (*Wilkerson* @ 922, emphasis added).

In the case at hand, there is **no** evidence of record that the jury agreed in advance to award Ms. Powell any sum of money, or that the jurors agreed in advance to average their individual damage assessments. Even accepting Asbury's hearsay affidavit, it is obvious that the jurors had differing opinions on the amount to be awarded to Plaintiff Powell but were able to reach a consensus during the course of their deliberations and render a unanimous verdict. Accordingly, the jury's verdict must be upheld as a matter of law.

D. The Jury Verdict Was Not Tainted by Passion or Prejudice.

Asbury alleges that the jury's verdict in this case was motivated by passion and prejudice. This contention is based on unwarranted assumptions and sheer speculation.

First, Powell's emotional damage must be understood within the context of her long term association with Asbury. Her grandfather, mother, father and brother were all graduates of Asbury. In turn, Powell graduated with a double major from Asbury in 1993, where she also played women's basketball, volleyball and softball (VR 2: 1/30/12: 01:19:35). Powell "loved" coaching and being a part of the Asbury community (VR 2: 1/30/12: 02:15:05).

Powell described the events of February, 2008 culminating in her termination as coach to be "devastating" beyond words and that she was "shell-shocked". She explained that the worst thing to be said about a single woman basketball coach at a Christian college was that she had engaged in inappropriate homosexual conduct. Although she loved coaching, her "heart couldn't take it" after the events of February, 2008 (VR 2: 1/30/12: 04:18:20). Following her termination by Asbury, Powell "struggled to live" for 2 ½ years as she did "everything possible" on a daily basis to find full-time employment. Powell had to sell her home in Wilmore; move into spare bedrooms in two different homes of friends; and depleted all of her savings (VR 2: 1/30/12: 04:13:27 to 04:16:02). She finally secured full-time employment in December, 2010 as a life skills instructor to inmates at the Fayette County Detention Center after working part-time stints for a construction company and as a power washer of decks and buildings (VR 2: 1/20/12: 04:00:37 to 04:11:04).

Powell's church life group leader, Rachel Pendleton, testified that she spent many hours with Powell on February 8, 2008, the day Powell first learned that there were allegations in inappropriate conduct. Ms. Pendleton met with Powell because Powell was crying so hard that she was "hysterical". Ms. Pendleton stayed with Powell throughout

that day because Powell was so upset, confused, and "grieving" (VR 5: 2/01/12: 01:41:42). Helen Musick, a pastor at Powell's church, met with Powell the day after the initial allegations and over the next three years. Musick described Powell's emotional state on February 9, 2008 as being similar to someone grieving a death and in shock and that Powell fell to her knees weeping. Over the next several years, Musick described Powell in their meetings as extremely confused, deeply sad and often tearful (VR 5: 2/01/12: 01:44:50 to 01:48:49).

As to the "first blush" rule, Asbury fails to demonstrate how the jury verdict in this case "shocks the judicial conscience". Appellees submit that the trial judge is in the best position to determine whether the jury's verdict was supported by substantial evidence and whether the verdict was excessive or improper at "first blush". No such finding was made by the trial court herein. See *Burgess v. Taylor,* 44S.W.3d 806 at 813 (Ky. App.2001) citing to *Davis v. Graviss*, 672 S.W.2d 928 (Ky.1984).

> ***[T]he trial court and appellate court have different functions ... the trial court is charged with the responsibility of deciding whether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witness's first-hand and viewed their demeanor and who has observed the jury throughout the trial.***

Judge Daugherty specifically stated he believed that the reason the damages were so high was because of the implications and innuendos that went along with a possible

lesbian relationship, particularly at a Christian college. He also stated that they jury award likely reflected the emotional stress Powell suffered while diligently trying to find work and that he could "understand why they (jury) did what they did". He found the jury to be no more emotional in this case than in others (VR 8: 3/08/12:09:51:05).

E). The Court Did Not Abuse Its Discretion in Awarding Attorney Fees and Costs.

The standard of review regarding an award of attorney fees and costs is whether or not the trial court abused its discretion. *Custom Tool and Manufacturing Co. v. Fuller*, No. 2005-CA-000857-MR (Ky. App. 1/19/2007) (Ky. App., 2007).

KRS 344.450 clearly mandates that a reasonable attorney fee be awarded in addition to actual damages sustained and costs incurred. While the amount of the fee to be awarded is subject to the court's discretion, the awarding of such fee is not discretionary, but required.

The seminal Kentucky case for calculation of reasonable attorneys' fees pursuant to KRS 344.450 is *Meyers. v. Chapman Printing Co., Inc.*, 840 S.W.2d 814 (Ky. 1992), wherein the Court found that the attorney's fee awarded should consist of the product of counsel's reasonable hours, multiplied by a reasonable hourly rate, which provides a "lodestar" figure, which may then be adjusted to account for various special factors in the litigation.

The factors to be considered are (a) Amount and character of services rendered; (b) Labor, time, and trouble involved; (c) Nature and importance of the litigation or business in which the services were rendered; (d) Responsibility imposed; (e) The amount of money or the value of property affected by the controversy, or involved in the

employment; (f) Skill and experience called for in the performance of the services; (g) The professional character and standing of the attorneys; and (h) The results secured. *Custom Tool, supra.*

Furthermore, "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Henley v. Eckerhart*, 461 U.S. 424, 103 S.Ct.1933, 76 L.Ed.2d 40 (1983), cited by *Meyers, supra*. In accord, see *Hill v. Kentucky Lottery Corp.*, 327 S.W.3d 412 (Ky. 2008).

Following trial and entry of Judgment, Powell timely moved for an award of attorneys' fees and costs (RA Vol. 6, 827-999). In support of Powell's motion for assessment of reasonable attorneys' fees herein, Powell attached and incorporated by reference the Affidavits of Powell's co-counsel, Debra Ann Doss and Bryan Daley as well as the Affidavits of William L. Davis and Willie E. Peele, Jr., both of whom are locally based attorneys with experience and expertise in the areas of law involved in this litigation.

The Affidavit of co-counsel Bryan Daley reflected a total of 103.50 hours expended on Ms. Powell's behalf at an hourly rate of $300.00 per hour, for a total of $31,050. The Affidavit of Debra Ann Doss, co-counsel for Plaintiff, reflected a total of 844.50 hours expended on Ms. Powell's behalf at an hourly rate of $300.00 per hour, for a total of $ 253,350.00.

A hearing was conducted before Hon. Hunter Daugherty on March 8, 2012, wherein Judge Daugherty verbally ruled that he did not doubt the time expended by Ms. Doss and

that significantly less time was expended on the defamation claim. He further stated that the time spent on the gender discrimination claim was necessary for the retaliation claim and would not offset the award of attorney fees because the gender discrimination claim failed. Because of the failed defamation claim, Judge Daugherty reduced the approved attorneys' hours by 20%. He further stated that, "I don't think too many attorneys could have won this case" and upheld the $300 per hour award to Ms. Doss, awarding her $200,000.00 in attorney fees. As to Mr. Daley, Judge Daugherty reduced his hours by 20% and reduced his hourly rate to $150 per hour, awarding Mr. Daley $12,500.00 in attorney fees. The Court's verbal ruling from the bench was reduced to written Order and Supplemental Judgment filed of record on March 19, 2012 (RA Vol.8, 1186-1187; Apx 2).

Judge Daugherty's verbal bench ruling clearly establishes that he was aware of and applied the factors referenced hereinabove in calculating and assessing attorneys' fees in this action and that he did not abuse his discretion in doing so. No reversible error was committed on this issue.

CONCLUSION

For the reasons stated above, Plaintiff/Appellee Deborah A. Powell respectfully requests that this Court affirm the trial court's Jugdment and Supplemental Judgment and the Court of Appeals opinion herein.

Respectfully Submitted,

DEBRA ANN DOSS
108 PASADENA DRIVE
SUITE 200
LEXINGTON, KENTUCKY 40503
(859) 260-1980
(859) 260-1310 (FAX)
COUNSEL FOR APPELLEE

BRYAN DALEY
2692 RICHMOND ROAD
LEXINGTON, KENTUCKY 40509
(859) 233-7400
COUNSEL FOR APPELLEE